78-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1225

HARRY B. HELMSLEY, et al.,
Appellants

v.

THE BOROUGH OF FORT LEE, et al.,
Appellee

AMERICANA ASSOCIATES, et al.,
Appellants

v.

THE BOROUGH OF FORT LEE,
Appellee

NEW JERSEY REALTY COMPANY, et al.,
Appellants

v.

THE BOROUGH OF FORT LEE, et al.,
Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS

On the Brief:
KENNETH E. MEISER,
Esquire

STANLEY C. VAN NESS,
Public Advocate
Department of the Public Advocate
CARL S. BISGAIER, Esquire
Attorney for Intervenor-Appellee
Division of Public Interest Advocacy
520 East State Street,
Trenton, New Jersey 08625
(609) 292-1692

Lawlor Enterprises Ltd., Mountainside, N.J., (201) 233-5300

TABLE OF CONTENTS

TABLE OF CASES

OTHER REFERENCES

INTRODUCTION

Appellee, New Jersey Department of the Public Advocate moves the court to dismiss the appeal herein on the ground that there is no substantial Federal question.

THE NATURE OF THE CASE

In August 1977 the New Jersey Supreme Court vacated and remanded these cases for a hearing on the issues of fair and reasonable return. The New Jersey Department of the Public Advocate was permitted to intervene at that point to represent the interests of tenants. A seventeen day hearing was held on the subject. Based on this voluminous record the New Jersey Supreme Court rendered a comprehensive 44 page decision. *Helmsley v. Borough of Fort Lee*, 78 *N.J.* 200, 394 *A.*2d 65 (1978).

Plaintiffs challenged the constitutionality of the Fort Lee rent control ordinance. The ordinance was amended to allow landlords an automatic 2.5% rent increase each year. Landlords could also automatically pass on to the tenant any increase in their property tax. Finally if the landlord needed additional rental increases, he could seek a hardship increase from the Fort Lee Rent Board. Plaintiffs argued that the provision of the ordinance restricting automatic rent increases to 2.5% per year was unconstitutional.

The New Jersey Supreme Court declared that the Constitution does not require rent control laws to permit all cost increases to be automatically passed through to tenants. In fact, a municipality could validly dispense with all automatic increases and require a landlord to apply to the Rent Board for all increases. 35a. This is the way that most public utility commissions handle rate increases for public utilities. However the court held that if a municipality seeks to impose stringent limitations on automatic increases, it must provide a prompt, fair and efficacious system of administration relief. *Helmsley*, 44a. If a municipality does not have a prompt fair and efficacious system of administrative relief, then it must enact a "more moderate rent control scheme," one which permits automatic

rent inceases sufficient to allow landlords a fair return. The court found that Fort Lee's rent board had not yet developed a prompt, fair and efficacious system of administrative relief.* Accordingly Fort Lee was required to provide automatic rent increases of sufficient magnitude so that they would not have a confiscatory effect on landlords.

Having established this legal standard, the court then reviewed the facts to determine whether, as plaintiffs alleged, the 2.5% limitation on automatic increases would have a confiscatory effect on Fort Lee landlords. The New Jersey court held that the landlords had failed to meet their burden of proof that the 2.5% limitation was confiscatory to landlords from 1974 to 1976. 18a-19a. Nevertheless the plaintiffs did prove that the foreseeable impact of the 2.5% limitation after 1976 would be widespread confiscation. *Helmsley*, 19a. Accordingly the New Jersey Supreme Court declared the amendment to the ordinance limiting rent increases to 2.5% invalid as of December 31, 1976; the effect of its decision was to reinstate the original provision of the ordinance allowing landlords to raise rents by the percentage increase in the Consumer Price Index. *Helmsley*, 35a.

Plaintiffs fundamental grievance with the New Jersey Supreme Court decision is that the court failed to invalidate the 2.5% limitation for the period 1974-76. This decision is not the result of an interpretation of constitutional law. The decision of the court is based purely and simply upon the failure of plaintiffs to meet their burden of proof. No substantial Federal question is presented.

Plaintiffs also raise a second legal question. The New Jersey Supreme Court determined that a rational basis for the imposition of rent control in Fort Lee existed. Plaintiffs now argue that, as a matter of substantive due process, nothing less than a national emergency will justify rent control. As will be

*Contrary to plaintiffs' assertions in its brief, the court in its decision did not declare the administrative system unconstitutional. The Board remains in operation and any aggrieved landlord may appeal a decision it renders to the New Jersey Superior Court, Appellate Division.

shown, this argument is without merit and does not raise a substantial Federal question.

I. THE FAILURE OF THE APPELLANTS TO MEET THEIR BURDEN OF PROOF ON THEIR ALLEGATION OF CONFISCATION FOR THE PERIOD 1974-76 DOES NOT RAISE A SUBSTANTIAL FEDERAL ISSUE.

Fort Lee New Jersey allowed landlords a 2.5% automatic rent increase each year and also allowed each landlord to automatically pass-through increases in property taxes. If a landlord needed additional increases in order to make a fair return, he could seek a hardship increase from the Fort Lee Rent Board.

Plaintiffs filed suit challenging this ordinance on constitutonal grounds. The New Jersey Supreme Court held that the plaintiffs had proven that 2.5% limitation after December 31, 1976 would have a "foreseeable confiscatory effect." *Helmsley*, 19a, 22a. However the landlords had failed to prove that the 2.5% limitation had a confiscatory effect for the period of November 6, 1974 to December 31, 1976. *Helmsley*, 19a. The issue which appellants seek this court to review is whether the New Jersey Supreme Court erred in finding that appellants failed to meet their burden of proof. This burden of proof question raises no substantial Federal constitutional issue.

The appellants chose not to produce any evidence about their investment in their buildings or about their return on investment for the period in question (1974-1976). *Helmsley*, 15a. Thus the Supreme Court had no evidence by which it could determine that the appellants were not making a fair return on investment.*

*The plaintiffs' asserted that they were not making a fair return on the fair market value of their buildings. The Supreme Court found this approach to be circular and unworkable. It is circular because the value is determined through capitalization of income; yet the amount of income to be allowed is the very question at issue. The circularity of a value formula in the context of public utility regulation was recognized in *Federal Power Commissioners v. Hope Natural Gas*, 320 *U.S.* 591, 64 *S. Ct.* 281, 88 *L. Ed.* 333 (1974). Because of the circularity problem, no public utility commission considers fair market value in determining rates for utilities. Bonbright *Principles of Public Utility Rates*, (1961) p. 163-4.

The appellants did however produce general financial data on their operating expenses and income. Based on a careful examination of this data, the New Jersey Supreme Court held that the appellants had not met their burden of proof in proving confiscation for this two year period. The New Jersey Supreme Court gave three reasons to support its decision. First the landlords net operating income (income minus operating expenses) in most buildings for 1976 was within 5% of the 1973 level. Furthermore, a simple comparison of figures "is vulnerable to distortion caused by abnormalities in either the 1976 or 1973 data" and the landlords "have not submitted any more sophisticated statistical analysis." *Helmsley*, 18a. The court concluded "On the present record, however, we cannot say that the 2.5% limitation was confiscatory because landlords' profits remained approximately constant between 1973 and 1976." *Helmsley*, 17a-18a. Likewise although the landlords' operating ratios (ratio of operating expenses to income) were rising, the court could not "say on this record that the general level is clearly confiscatory. Here again, plaintiffs presented only sketchy and conclusory testimony." *Helmsley*, 18a. Finally the court stated that the appellants had not proven that the few buildings with low net operating income and high operating ratios which might have qualified for hardship relief were not isolated cases. The court held that a limited number of hardship cases alone does not prove widespread confiscation. *Helmsley*, 18a-19a. The decision of the New Jersey Supreme Court that the Fort Lee Ordinance in its application from 1974 to 1976 was constitutional is not based upon any far-reaching constitutional determination. Its simple holding is that appellants failed to meet their burden of proof. No substantial Federal question is involved.

II. PLAINTIFFS' FAILURE TO PROVE THE ABSENCE OF A RATIONAL BASIS FOR RENT CONTROL DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

Plaintiffs argued that there was no rational basis for rent control in Fort Lee. After carefully considering the evidence, the New Jersey Supreme Court rejected their argument. Indeed the New Jersey Supreme Court found that plaintiffs' own

proofs established a rational basis for rent control. The court stated:

> Contrary to plaintiffs' contentions, their own proofs demonstrate an adequate factual basis for adoption of rent control in Fort Lee. In *Troy Hills Village, supra,* the municipality's expert testified that a vacancy rate of less than 3% indicated a serious housing shortage. Other testimony then showed that the local vacancy rate was less than 2%. We found that, on this basis, the governing body could rationally conclude that rent control was necessary. Similarly, in the present case, several of plaintiffs' experts stated that a 5% vacancy rate was typical of a housing market in equilibrium; one fixed a 3% vacancy rate as indicative of a housing shortage. Plaintiffs' financial data indicate a 1973 vacancy rate of less than 1.5% in 28 buildings with 4648 units. One 1260-unit complex, Horizon House, had a 7% vacancy rate which appears to be abberational. Even including Horizon House, the borough-wide vacancy rate was 2.6%. As in *Troy Hills Village, supra,* these data constitute a rational basis for adoption of rent control. We note parenthetically that vacancy rates dropped under Ord. No. 74-32. The 1976 vacancy rate in 35 buildings with 7542 units was 1.9%. Thus it is apparent that there continues to be a rational basis for rent control in Fort Lee. *Helmsley,* 8a-9a.

Plaintiffs further argue that a "serious housing shortage" Helmsley, 8a, is not sufficient grounds for imposing rent control. Based on two cases which are fifty years old, *Block v. Hirsch,* 256 *U.S.* 135 (1921) and *Chastleton Corp. v. Sinclair,* 264 *U.S.* 543 (1924), plaintiffs assert that nothing short of a national emergency will justify rent control. Plaintiffs' argument however is forty years out of date. As one commentator concluded "The concept that an emergency is a constitutional prerequisite to price controls is a relic from the 1920 era of economic substantive due process." Barr and Keating. *The Last Stand of Economic Due Process-The Housing Emergency Requirement for Rent Control,* 7 Urban Lawyer 447 (1975).

In the 1920s and the early 1930s the Supreme Court repeatedly held that legislation regulating the amount to be charged for goods and services was unconstitutional as a violation of due process unless there was an emergency necessitating the legislation. The reign of Economic Due Process however came to an end with a series of cases in the 30s. One of these cases *Nebbia v. New York,* 291 *U.S.* 502 (1933) specifically repudiated the emergency requirement for price controls. *Nebbia* contains an exhaustive discussion of the right of government under the police power to regulate business, including the price which businesses charge.

The key sentence of *Nebbia* states:

> Price control, like any other form of regulation is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. 291 *U.S.* at 539.

A number of courts have recognized that *Nebbia* was the death knell for the emergency doctrine which plantiffs assert. For example in *Eisen v. Eastman,* 421 *F*2d 560, 567 (2nd Cir. 1960) Judge Friendly declared:

> (W)e have no doubt that it (the Supreme Court) would sustain the validity of rent control today . . . The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that *Nebbia v. New York,* 291 *U.S.* 502, 539, 54 *S. Ct.* 505, 78 *L. Ed.* 940, 89 *A.L.R.* 1469 (1934) was decided.

Likewise both the New Jersey Supreme Court in *Hutton Park Gardens v. West Orange Town Council,* 68 *N.J.* 543, 350 *A.*2d 1 (N.J. 1975) and the Maryland Court of Appeals in *Westchester West No. 2 v. Montgomery County Md.,* 276 *Md.* 448, 348 *A.*2d 856 (Md. Ct. of Ap. 1975) have rejected the emergency argument. Both courts trace the evolution of the United States Supreme Court decisions in the first part of the twentieth century. Both conclude that the *Nebbia* decision

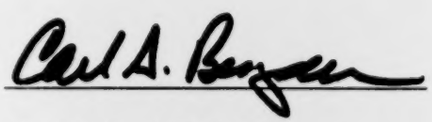
and the repudiation of economic substantive due process eliminate any requirement that price controls must be based upon an emergency. Both follow *Nebbia* and state that the constitutional test for rent control is whether the governing body had a rational basis for imposing it. Since the Supreme Court in *Helmsley* found such a basis, there is no substantial Federal question in this case.

CONCLUSION

It is respectfully submitted therefore that no substantial question is presented in this matter and the appeal should therefore be dismissed.

STANLEY C. VAN NESS, PUBLIC ADVOCATE

DATED: 3/7/79

BY: 

CARL S. BISGAIER
Attorney for Intervenor-Appellee